Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali

HIGH COURT (TEMERLOH) — ORIGINATING SUMMONS NO 24–117 OF 1996
AZHAR J
22 MARCH 1999

Banking *— Securities for advances — Charge — Charge to secure loan — Stamped up to RM100,000 — Liability of chargor — Whether limited to amount covered by stamping only — Stamp Act 1949 s 52(1)*

Civil Procedure *— Affidavits — Affidavit dated earlier than issue of writ — Validity — Rules of the High Court 1980 O 41 r 1*

The defendant is the owner of a plot of land which was charged to the plaintiff in order to secure a loan of RM100,000 granted by the latter to a third party. The third party failed to repay the loan and the accrued interest. On 25 September 1996, the plaintiff took out an originating summons for an order to sell the land by public auction after the defendant neglected to remedy the breach specified in the plaintiff's statutory notice. (The plaintiff had claimed for RM253,585.02 with further interest at 12.25% per annum.) The originating summons was supported by an affidavit sworn by the plaintiff's branch manager on 17 September 1996. The defendant opposed the plaintiff's application on two grounds: (i) the affidavit filed in support of the plaintiff's originating summons was defective and inadmissible as it preceded the originating summons; and (ii) there was no evidence of upstamping by the plaintiff to support its claim of additional sum of money having been advanced to the third party in excess of the original RM100,000 for which the charge was created.

Held, allowing the application, only to satisfy the plaintiff's claim to the extent of RM100,000 with the outstanding interest:

(1) To disallow the affidavit to be used in support of the plaintiff chargee's application would militate against basic principles of justice. Swearing of an affidavit that bears no registration number of the case as the originating process has not begun does not violate any provision of the law as it stands. Order 41 r 1 of the Rules of the High Court 1980 only requires that a title be given to the affidavit that is to be used in support of an originating summons. The case number that is given by the court registry upon filing of an originating summons is for administrative purpose and can hardly be considered a title (see pp 633E–634B); *Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118 not followed

(2) No evidence of any loan in excess of RM100,000 should be admitted as the stamp duty paid covered only a loan of that amount. The words 'duly stamped' in s 52 of the Stamp Act 1949 mean that instruments chargeable with duty should not only be stamped but must be stamped in accordance with the First Schedule of the Act. No evidence was adduced by the plaintiff chargee that upstamping was done for the additional loan facilities above the original RM100,000 (see pp 634C–635A).

[Bahasa Malaysia summary

Defendan adalah pemilik sebidang tanah yang telah digadaikan kepada plaintif untuk menjamin suatu pinjaman sebanyak RM100,000 yang telah diberikan oleh plaintiff kepada pihak ketiga. Pihak ketiga telah gagal untuk membayar balik pinjaman dan faedah yang terakru. Pada 25 September 1996, plaintif telah mengeluarkan saman pemula untuk perintah penjualan tanah tersebut melalui lelong awam selepas defendan abai untuk meremedikan pemecahan tersebut yang telah dinyatakan secara spesifik di dalam notis berkanun plaintif. (Plaintif telah menuntut untuk RM253,585.02 dengan faedah lanjutan pada 12.25% setahun). Saman pemula tersebut disokong oleh suatu afidavit yang diikrarkan oleh pengurus cawangan plaintiff pada 17 Sepetember 1996. Defendan telah menentang permohonan plaintif atas dua alasan: (i) afidavit yang telah difailkan untuk menyokong saman pemula plaintif adalah cacat dan tidak boleh diterima oleh kerana ia mendahului saman pemula tersebut; dan (ii) tidak terdapat keterangan mensetem oleh plaintif untuk menyokong tuntutan jumlah wang tambahan melebihi RM100,000 yang asal yang telah diberikan kepada pihak ketiga di mana gadaian tersebut diwujudkan.

Diputuskan, membenarkan permohonan, hanya untuk memuaskan tuntutan plaintif setakat RM100,000 dengan faedah yang masih berhutang:

(1) Untuk tidak membenarkan afidavit digunakan untuk menyokong gadaian permohonan plaintif akan menentang prinsip asas keadilan. Mengikrar suatu afidavit yang tidak mempunyai nombor pendaftaran kes oleh kerana proses pemula belum dimulakan lagi tidak menyalahi sebarang peruntukan undang-undang seperti yang sedia ada. Aturan 41 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 hanya memerlukan bahawa tajuk diberikan kepada afidavit yang akan digunakan untuk menyokong saman pemula. Nombor kes yang diberikan oleh pendaftaran mahkamah selepas memfailkan saman pemula adalah untuk tujuan pentadbiran dan tidak boleh dilihat sebagai suatu tajuk (lihat ms 633E–634B); *Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118 diikut.

(2) Keterangan mengenai sebarang pinjaman yang melebihi RM100,000 tidak patut diterima kerana setem duti yang dibayar hanya meliputi pinjaman sebanyak itu. Perkataan 'disetem seperti yang sepatutnya' di dalam s 52 Akta Setem 1949 bermaksud instrumen yang boleh dikenakan duti bukan sahaja kena disetem tetapi mestilah disetem menurut Jadual Pertama Akta tersebut. Tiada keterangan telah diberikan oleh penggadai iaitu plaintif bahawa pembayaran setem berikutan dibuat untuk kemudahan pinjaman tambahan melebihi RM100,000 yang asal (lihat ms 634C–635A).]

Notes

For cases on an affidavit dated earlier than issue of writ, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–220.

For cases on whether liability of chargor is limited to amount covered by stamping, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1441–1442.

Cases referred to

Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor [1999] 1 AMR 118 (refd)

Nothman v Barnet London Borough Council [1978] 1 WLR 220 (refd)

Legislation referred to

National Land Code 1965 s 254
Rules of the High Court 1980 O 41 r 1
Stamp Act 1949 ss 4, 52(1), Sch 1
Evidence Act 1950 ss 91, 92

V Vishnu Kumar (*Syarikat Kam Woon Wah*) for the plaintiff.
Vickneswary (*V Manickam & Partners*) for the defendant.

Cur Adv Vult

Azhar J: The defendant is the registered owner of Land Lot 3954, Geran 1695, Mukim Gali, Daerah Raub, Pahang which she mortgaged to the plaintiff in order to secure a loan of RM100,000 granted by the latter to a third party ('the borrower').

The borrower failed to repay the loan with accrued interest. As a result the plaintiff through their solicitors, issued the statutory notice in Form 16D under s 254 of the National Land Code 1965 to remedy the breach within 30 days of the receipt of the said notice failing which the plaintiff would apply for an order for sale.

The defendant chargor neglected to remedy the breach specified in the statutory notice. This led to the plaintiff chargee taking out an originating summons for an order to sell the land by public auction. The originating

summons was filed on 25 September 1996 together with a supporting affidavit of the plaintiff chargee's branch manager which was sworn on 17 September 1996. The outstanding sum due to the plaintiff chargee as at 26 August 1996 was said to be RM253,585.02 with further interest thereon at an additional daily rate of 12.25% per annum.

In opposition to the plaintiff chargee's application counsel for the defendant chargor raised two issues. Firstly, the court's attention was drawn to the charge instrument. At the top right hand corner of the first page of the document there is an endorsement that reads 'Gadaian Asal bersetem RM500 untuk pinjaman sebanyak RM100,000'. In this connection counsel further referred to cl 39 of the charge annexure. The relevant portion of the clause reads:

> In the event the total moneys and liabilities due and owing to the chargee hereunder shall at any time exceed the principal limit or the limit for which the security created shall for the time being have been stamped to secure, the chargee shall be at liberty at any time to, without further reference to and without the consent of the chargor, upstamp the security created herein for the excess amount ... .

It was submitted for the defendant chargor that there was no evidence of upstamping by the plaintiff chargee to support the latter's claim of additional sum of money having been advanced to the borrower in excess of the original RM100,000 for which the charge was created.

The second issue raised by the defendant chargor was with regard to the affidavit of the plaintiff chargee's branch manager filed in support of the originating summons. Counsel pointed out that the deposition was made and sworn on 17 September 1996 preceding the originating summons that was filed on 25 September 1996. Citing *Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118, it was submitted that the affidavit was defective and thus inadmissible. In that case by reason of the supporting affidavit sworn one week prior to filing of the originating summons it was held by his Lordship Kamalanathan Ratnam J that such affidavit was a nullity and its effect incurable. He therefore dismissed the originating summons.

For convenience and to avoid futility in the court's finding, it would be appropriate for me to deal with the second issue first.

In *Arab-Malaysian Finance Bhd*, the learned judge in his judgment made a specific reference to O 41 r 1 of the Rules of the High Court which seemed to be the pivot of his decision. Order 41 r 1 reads:

> Subject to paragraphs (2) and (3) every affidavit sworn in a cause or matter must be entitled in that cause or matter.

Taking up from this proviso, what is required in an affidavit that is to be used in support of an originating summons is a title to be given to it. The title, to my mind should relate to the subject matter of the cause of action. In the instant case the intitulement on the front page of the supporting affidavit reads:

A Dalam Mahkamah Tinggi Malaya di Temerloh
Dalam Negeri Pahang Darul Makmur
(Bahagian Sivil)
Saman Pemula No 24-117-96

Dalam perkara Gadaian pihak yang ketiga yang ditandatangani oleh Nor Harizan bte Mohd Ali (KP No 5941959) untuk menjamin
B pembayaran daripada Zainudin bin Haji Hashim @ Haji Chin kepada Hongkong Bank (M) Bhd melalui Gadaian Perserahan No 5876 / 93 Jilid 332 Folio 79 yang bertarikh 11 November 1993 ke atas hartanah di bawah Lot No 3954 Geran No 1695 Mukim Gali, Daerah Raub, Pahang Darul Makmur

C Dan

Di dalam perkara Seksyen 256 dan 257 Kanun Tanah Negara 1965

Dan

Di dalam perkara Aturan 7 Kaedah-Kaedah Mahkamah Tinggi 1980

D Antara

Hongkong Bank (M) Bhd Plaintif

Dan

Nor Harizan bte Mohd Ali Defendan

E This intitulement, in my view is the title of the cause or matter that an affidavit should have as required under O 41 r 1.

A case number that is given by the court registry upon filing of an originating summons is for administrative purpose and can hardly be considered as title in a cause or matter.

F Swearing of an affidavit that bears no registration number of the case as the originating process has not begun does not violate any provision of the law as it stands. To hold otherwise would undoubtedly result in grave hardship and unnecessary inconvenience to the parties concerned. In this connection it would be relevant to quote what Lord Denning MR had to say in *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 at p 228:

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> In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in if necessary — so as to
H do what Parliament would have done, had they had the situation in mind.

I dare say, the Rules Committee in formulating the rules as they are did not have the slightest intention to cause hardship and inconvenience let alone injustice to the parties concerned.

Where faced with a situation where interpretation of a statute would
I lead to absurdity and injustice, the court should use its good sense to give

such statute its widest and most liberal meaning so that the parties would not suffer injustice. It is presumed that Parliament does nothing in vain. A

In the present case to disallow the supporting affidavit to be used in support of the plaintiff chargee's application for reasons stated in *Arab-Malaysian Finance Bhd*, which I am sorry to say I do not subscribe, would militate against basic principle of justice. For the above reasons counsel's objection to the affidavit in question is overruled. B

I now move on to the first issue.

On this issue no explanation was advanced on behalf of the plaintiff chargee. According to the endorsement a stamp duty of RM500 was paid in respect of RM100,000 loan. Clearly, it was made pursuant to s 4 and in accordance with the First Schedule of Stamp Act 1949. Any additional amount of loan to be issued by the plaintiff chargee to the borrower would definitely under the law attract additional stamp duty. In this respect, regard must be had to s 52 of the Act which provides: C

> (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authorized to receive evidence ... unless such instrument is duly stamped ... . D

To my mind the words 'duly stamped' must necessarily mean that the instrument concerned should not only be stamped as required under s 4, it must also be stamps in accordance with the First Schedule of the Act.

The plaintiff chargee's branch manager in his supporting affidavit (KM2) at para 6 deposed that as at 26 January 1996 the total sum of money owed by the borrower to the bank was RM241,904.09 with interest of 12.25%. E

A further affidavit, this time by the plaintiff chargee's subsequent branch manager was filed on 16 September 1998. In para 8 of the said affidavit (KM75) it was deposed that subsequent to the registration of the charge the bank had on five occasions gradually increased the loan facilities to the borrower until it finally reached a figure of RM600,000. F

With this scenario it is also appropriate to look at the relevant provisions under the law of evidence s 91 of the Evidence Act 1950 reads: G

> When the terms of a contract or of a grant of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... .

The above provision provides that the contents of a document must be proved by the document itself, and s 92 provides that subject to certain privisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or substracting from its terms. H

In our case here no evidence was adduced by the plaintiff chargee that upstamping was done for the additional loan facilities of RM500,000. As the stamp duty paid covered only a loan of RM100,000, no evidence of any I

A loan in excess of that amount should be admitted. In the circumstances, I hold that the defendant chargor has partly succeeded in showing cause to the contrary that compels me to make an order that the defendant changor's liability under the charge is only to the extent of RM100,000 plus interest as provided under the agreement.

B I therefore make an order that the land in question is to be sold by a public auction in order to satisfy the plaintiff chargee's claim to the extent of RM100,000 with the outstanding interest.

Order is also made for costs.

Order accordingly.

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Reported by Joel Ng

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